Ohio Northern University Law Review

Volume 44 | Issue 1 Article 7

2019

# TRUMP V. INTERNATIONAL REFUGEE ASSISTANCE PROGRAM

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# Trump v. International Refugee Assistance Program
# 137 S.Ct. 2080 (2017)[1]

## I. INTRODUCTION

It is undeniable that our country has undergone a unique change throughout the last several years. While the people have been the ultimate catalyst, the United States government, and especially our newly elected president, have accelerated and inflamed that change, resulting in an increased partisan divide. The Supreme Court of the United States was forced into this political divide when it was asked to determine whether the Executive should be afforded a stay of injunctions on an executive order that could drastically alter the country's immigration policies for the foreseeable future.

The question before the Court in *Trump v. Int'l Refugee Assistance Program*[2], ("IRAP"), was whether the Court should stay two separate injunctions prohibiting the enforcement of President Donald J. Trump's Executive Order ordering the suspension of entry of nationals from six countries.[3] The Court granted the stay of injunctions insofar as the injunctions prevented enforcement of the Executive Order with respect to foreign nationals who have no bona fide relationship with a person or entity of the United States, leaving the injunctions in place for the respondents and those similarly situated.[4] In its judgment, however, the Court arguably failed to effectively follow the fundamental legal principles for issuing a stay of a preliminary injunction. Notably, the Court failed to address whether the Executive (the "Government") was likely to succeed on the merits. The Court also improperly balanced the equities. Accordingly, the Court should have stayed the injunctions in their entirety if the legal standard been properly applied. Instead, the Court's decision to tailor its equitable judgment by creating classes of immigrants that had not existed before may have significant consequences for the lower courts and the nation.

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Following an immediate challenge, a nationwide temporary restraining order, and the eventual revocation of his first executive order directing the

1. This note was written prior to the Supreme Court's decision to dismiss as moot the merits of this case. *See* Miscellaneous Order, 583 U.S. ____ (2017).
2. 137 S. Ct. 2080 (2017) [hereinafter *IRAP*].
3. *Id.* at 2087.
4. *Id.*

temporary suspension of entry of certain foreign nationals into the U.S., President Trump issued Executive Order No. 13780, hereinafter referred to as EO-2, on March 16, 2017.[5] In relevant part, EO-2 set out a series of directives that were ultimately challenged in two separate courts. First, EO-2 directed the Secretary of Homeland Security to conduct a global review of the adequacy of information foreign governments provide about nationals applying for United States visas.[6] Second, EO-2 directed the suspension of entry of foreign nationals from six countries identified as presenting heightened terrorism risks for ninety days to prevent entry of potentially dangerous individuals during the Secretary of Homeland Security's review process.[7] The temporary halt on entry would also reduce the investigative burden on agencies, facilitate proper review, and establish adequate standards to prevent the "infiltration by foreign terrorists."[8] Third, EO-2 suspended the acceptance of refugees under the United States Refugee Assistance Program ("USRAP") for 120 days following the effective date.[9] Fourth, EO-2 limited the entry of refugees into the United States in the 2017 fiscal year to no more than 50,000, reasoning any number greater than this would be "detrimental to the interests of the United States."[10] The Order's effective date was March 16, 2017.[11]

Two separate lawsuits were filed in opposition to EO-2, claiming that the Order violated the Establishment Clause of the First Amendment because it was motivated by an "animus toward Islam" and not by national security concerns.[12] The lawsuits also claimed that EO-2 did not comply with the Immigration and Nationality Act ("INA").[13] The first lawsuit was filed in the U.S. District Court for the District of Maryland by the International Refugee Assistance Program on behalf of three organizations and six individuals, including John Doe #1, a lawful permanent resident whose Iranian wife was seeking entry to the United States.[14] In that case, the district court entered a nationwide preliminary injunction barring the government from enforcing § 2(c) of EO-2, reasoning John Doe #1 was

5. *Id.* at 2083.

6. Exec. Order No. 13780 § 2(a), 82 Fed. Reg. 13209, 13212 (March 9, 2017) [hereinafter EO-2] (directing the Secretary to report his findings within 20 days of the Order's effective date, followed by a 50-day period where nations identified as deficient would be charged with correcting their practices).

7. EO-2 § 2(c), 82 Fed. Reg. at 13213.

8. *Id.*

9. EO-2 § 6(a), 82 Fed. Reg. at 13215-16 (instructing the Secretary of State to evaluate the USRAP application process and implement any additional procedures to ensure potential refugees do not pose a threat to national security).

10. EO-2 § 6(b), 82 Fed. Reg. at 13216.

11. EO-2 § 14, 82 Fed. Reg. at 13218.

12. *IRAP*, 137 S. Ct. at 2084.

13. *Id.*

14. Int'l Refugee Assistance Program v. Trump, 2017 U.S. Dist. LEXIS 37645 at *16-19 (D. Md., Mar. 16, 2017).

likely to succeed on his Establishment Clause claim.[15] In the second lawsuit, U.S. District Court for the District of Hawaii issued a nationwide preliminary injunction of §§ 2 and 6 after the State of Hawaii and Dr. Ismail Elshikh, a state resident who had a family member seeking entry, claimed those sections violated the Establishment Clause.[16] The Government appealed both rulings.[17]

On May 25, 2017, the United States Court of Appeals for the Fourth Circuit issued a decision that upheld the lower court's injunction prohibiting the enforcement of § 2(c), holding the primary purpose of that section to be religious.[18] That court found that a reasonable observer familiar with all the circumstances—including the predominantly Muslim character of the designated countries and statements made by President Trump during his presidential campaign—would conclude that § 2(c) was motivated principally by a desire to exclude Muslims rather than for secular reasons.[19] On June 12, 2017, the United States Court of Appeals for the Ninth Circuit unanimously held in favor of the plaintiffs, upholding the lower court's nationwide injunction concerning § 2(c) entry suspension and the § 6(a)-(b) refugee admission program and limit.[20] The Ninth Circuit, however, did not base its holding on the lower court's constitutional analysis, but held EO-2 likely exceeded the president's authority under the INA.[21]

The Government petitioned for certiorari and filed applications seeking stays of the injunctions.[22] The Court granted the Government's petitions for certiorari and consolidated the cases to later be argued on its merits.[23] The Court then moved to address whether the preliminary injunctions barring enforcement of the § 2(c) entry suspension should be stayed.[24] The Court ultimately dismissed the case as moot; the provision was temporary because the suspending of foreign nationals from the specified countries "expired by its own terms" on September 24, 2017.[25]

15. *Id.* at *59.
16. Hawaii v. Trump, 2017 U.S. Dist. LEXIS 47042 at *2 (D. Haw., March 29, 2017).
17. Int'l Refugee Assistance Program v. Trump, 857 F.3d 554, 581 (4th Cir. 2017).
18. *Id.* at 595.
19. *Id.* at 595.
20. Hawaii v. Trump, 859 F.3d 741, 755-56 (9th Cir. 2017).
21. *Id.*
22. *IRAP*, 137 S. Ct. at 2085-86.
23. *Id.* at 2086.
24. *Id.* at 2087.
25. Miscellaneous Order, 583 U.S. ____ (2017).

## III. COURT'S DECISION AND RATIONALE

### *A. Per Curiam Opinion*

The Court delivered a per curiam decision while Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justices Alito and Gorsuch joined.[26] The Court initially noted its equitable discretion and flexibility when issuing a stay, which allowed the Court to weigh all the circumstances surrounding the issue and tailor a unique stay.[27] Balancing the equities of the Government and the respondents, as well as the interests of the public at large, the Court granted the Government's stay application in part and narrowed the scope of the injunctions as to § 2(c).[28]

The Court examined the balancing of the equities analysis performed by the lower courts.[29] Noting the hardships suffered by the delayed entry of the respondents' family members into the United States, the Court took issue with the generalized weight given to foreign nationals.[30] The Court reasoned that denying entry to a foreign national with no connection to the United States *does not burden* any American party or create any legally relevant hardship as compared to the respondents.[31] Therefore, the Court narrowed the scope of the injunction on § 2(c), holding the injunctions would remain in place only with respect to the respondents and those similarly situated; essentially § 2(c) would not be enforced against any foreign national who had a credible claim of a bona fide relationship with a person or entity in the United States.[32] The Court then defined a "bona fide relationship" as a close familial relationship for individuals or a formal, documented relationship for entities "formed in the ordinary course, rather than for the purpose of evading EO-2."[33] The Court also applied this reasoning to the Hawaii injunction, which suspended § 6 of EO-2 as well.[34] In that reasoning, the Court concluded that the scales tip in favor of the Government's compelling need to provide for the Nation's security when it comes to refugees who lack any bona fide connection to the United States.[35]

26. *IRAP*, 137 S. Ct. at 2082, 2089.
27. *Id.* at 2087.
28. *Id.*
29. *Id.*
30. *Id.* at 2088.
31. *IRAP*, 137 S. Ct. 2088.
32. *Id.*
33. *Id.*
34. *Id.* at 2089.
35. *Id.*

### *B. Concurring in Part and Dissenting in Part Opinion by Justice Thomas*

Justice Thomas, with whom Justices Alito and Gorsuch joined, concurred with the Court's per curiam opinion insofar as the preliminary injunctions entered should have been stayed but disagreed with the extent of the decision, stating that he would have stayed the injunctions in full.[36] Justice Thomas took issue with the Court's reasoning, remarking that a court's decision to grant a stay must be "guided by sound legal principles," the most critical factors being "'(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits and (2) whether the applicant will be irreparably injured absent a stay.'"[37] Only after those factors are satisfied, Justice Thomas declared, can the Court balance the equities by exploring relative harms and the public interest. [38]

Justice Thomas analyzed the case according to these principles and held that the Government satisfied the "likely-to-succeed" standard by showing a significant reason for issuing a stay pending certiorari and making a strong showing that it was likely to succeed on its merits.[39] Following this analysis, Justice Thomas balanced the equities of the parties and argued that a failure to stay the injunctions would cause irreparable harm by interfering with national security interests, tipping the scales in the Government's favor.[40] Justice Thomas concluded his argument by acknowledging potential issues the Court's opinion might create, such as the broad scope of the relief and the burden of extensive decision-making on executive officials and courts.[41] Accordingly, Justice Thomas, along with Justices Alito and Gorsuch, advocated for the stay of the injunctions in their entirety.[42]

## IV. ANALYSIS

### *A. Introduction*

The Court has established that it possesses the discretion to tailor an equitable judgment to reflect the circumstances of a case.[43] While the Court has discretion and flexibility as a court of equity, the responsibility of

36. *IRAP*, 137 S. Ct. at 2089.
37. *Id.* (quoting Nken v. Holder, 556 U. S. 418, 434 (2009)).
38. *Id.* at 2090 (citing *Nken*, 556 U. S. at 435).
39. *IRAP*, 137 S. Ct. at 2090.
40. *Id.*
41. *Id.* Justice Thomas remarked that a court's role is to "provide relief only to claimants . . . who have suffered or will imminently suffer, actual harm." Lewis v. Casey, 518 U.S. 343, 349 (1996).
42. *IRAP*, 137 S. Ct. at 2090.
43. *Id*. at 2087.

forming an equitable remedy like a stay must still be guided by "sound legal principles."[44] Primarily, those legal principles must be followed because preliminary injunctions and stays are extraordinary forms of relief.[45] The stay issued in *IRAP* is a shining example of a stay that was tailored by the Court based on the circumstances surrounding the two cases at bar. While the Court flexed its discretion to create a distinction between two groups of persons, however, it failed to adequately follow the legal principles and test articulated in *Nken v. Holder*, hereinafter referred to as *Nken*.[46]

This analysis examines the Court's misapplication of the *Nken* test while offering an analysis in support of the dissenting opinion and addressing potential issues that may occur when future courts consider preliminary injunctions and stays. From the outset, the Court failed to completely apply the first factor of the *Nken* test, which charges the Court to evaluate whether the Government has made a strong showing that it is likely to succeed on the merits. Next, the Court inadequately balanced the equities by heavily tipping the scales toward the harms suffered by the respondents and ignored the importance of the president's power to issue such an order and paramount interests of national security. Finally, because the Court was not guided by the sound legal principles it created, the equitable judgment may have lasting consequences. Accordingly, the dissenting opinion should have instead been the unanimous decision of the Court.

### *B. Discussion*

#### *i. The Court's Historical Analysis in Granting a Stay*

In *IRAP*, the Court emphasized that it had the discretion to mold an equitable judgment to fit the circumstances of a case, including affording only partial relief to a stay applicant.[47] However, as Justice Thomas noted, the Court must follow certain legal guidelines when tailoring its decision.[48] The Court previously outlined its test for determining whether to grant a stay in *Nken*.[49] According to the Court, an application for a stay may be issued so long as a court has considered:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay

44. *Nken*, 556 U.S. at 434 (citing Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005)).
45. *Id.* at 437 (Kennedy, J., concurring).
46. *Id.* at 434.
47. *IRAP*, 137 S. Ct. at 2087.
48. *Id.* at 2089.
49. *Nken*, 556 U.S. at 434.

> will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[50]

Of these four factors, the first two are the most important because a court cannot rely solely on minor possibilities of success or irreparable injury.[51] Instead, there must be a significant showing of the likelihood of success on the case's merits, as well as a significant possibility of irreparable harm.[52] Further, as Justice Scalia has noted, when a court considers the likelihood of success, "[t]here must be a reasonable probability that certiorari will be granted . . . [and] a significant possibility that the judgment below will be reversed."[53] Therefore, the Court may craft an equitable judgment by emphasizing whether the claim will succeed on its merits, which is then followed by the balancing of relative harms to parties and the consideration of public interest.

### *ii. The Court Failed to Apply the "Likely to Succeed" Standard*

The Court tailored its per curiam decision in *IRAP* to reflect the relative harms to both parties and the public at large.[54] The Court cited the immediate harms that would come to the respondents if the injunctions were stayed, along with the harms suffered by those in similar circumstances.[55] The Court, however, held that balance tipped in favor of the Government when an individual or entity seeking entry did not have a "bona fide" relationship with the United States.[56] Thus, the Court adequately applied at least part of the *Nken* test. Surprisingly, though, the Court failed to address the first factor of the *Nken* test, which Justice Thomas referenced as one of the most critical of the four.[57] In deciding to grant a stay, the Court must consider "whether the stay applicant has made a strong showing that it is likely to succeed on the merits," which is shown by whether certiorari may be granted along with the possibility that the appellate courts' decisions will be reversed.[58]

In this case, according to Justice Thomas, the Government did both.[59] Addressed in its Reply Brief, the Government posited that the case warranted review because the lower courts' decision nullified a national-

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50. *Id.*
51. *Id.* at 434-35.
52. *Id.*
53. Barnes v. E-Systems, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers).
54. *IRAP*, 137 S. Ct. at 2088.
55. *Id.* at 2087
56. *Id.* at 2088.
57. *Id.* at 2089.
58. *Nken*, 556 U.S. at 434; *Barnes*, 501 U.S. at 1302.
59. *IRAP*, 137 S. Ct. at 2090.

security directive from the president.[60] From a policy position, this position has some merit because the nullification of an executive order has, among other things, overtones of separation of powers. Furthermore, the Fourth and Ninth Circuits raised issues with EO-2, determining that the respondents made a sufficient showing based on violations of the Establishment Clause and the Immigration and Nationality Act.[61] These lower court decisions should warrant judicial review because they concern both historical and modern, topical issues with the Executive Branch of government and the powers afforded to it. Accordingly, certiorari should be granted to the Government and, as Justice Thomas noted, it was and, at the time of the decision, the merits of the case were to be argued before the Court.[62] However, the Court dismissed the case as moot prior to it being heard on its merits because the period dictated in EO-2 had run its course.[63]

The Government also argued that there is a fair prospect that the Court would reverse the lower court's judgment.[64] The chance of success on the merits must be "better than negligible," suggesting more than a mere possibility of relief is required to exemplify a possible reversal.[65] Justice Thomas emphasized that the Government met this standard.[66] Additionally, the Government noted that the respondents did not dispute the lack of rights afforded to aliens and that the denial of entry of those aliens is generally not subject to judicial review.[67] Further, the Government noted that there is no "final agency action" for review under the Administrative Procedure Act which would also suggest that EO-2 is not subject to judicial review.[68]

In *Haig v. Agee*,[69] the Court held: "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[70] The purpose of EO-2 is the assessment of foreign policy and national security, suggesting that the Government will succeed on its merits because of this precedent. Finally, the Government provided a strong argument emphasizing that the respondents' Establishment Clause claims were meritless because "individuals indirectly injured by alleged religious

60. Reply Brief for Appellant-Petitioner, Trump v. Hawaii, 137 S. Ct. 2080 (2017), (No. 16-1436, No. 16-1540, No. 16A1191), 2017 U.S. S. Ct. Briefs LEXIS 2506 at *3.
61. *IRAP*, 137 S. Ct. at 2086.
62. *Id.* at 2090.
63. Miscellaneous Order, 583 U.S. ____ (2017).
64. Reply Brief for Appellant-Petitioner, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017), (No. 16-1436, No. 16-1540, No. 16A1191), 2017 U.S. S. Ct. Briefs LEXIS 2506 at *8-9.
65. *Nken*, 556 U.S. at 434 (citing Sofinet v. INS, 188 F.3d 703,707 (7th Cir. 1999)).
66. *IRAP*, 137 S. Ct. at 2090.
67. Reply Brief for Appellant-Petitioner, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017), (No. 16-1436, No. 16-1540, No. 16A1191), 2017 U.S. S. Ct. Briefs LEXIS 2506 at *8.
68. *Id.* at *9
69. 453 U.S. 280 (1981).
70. *Id.* at 292.

discrimination against others generally may not sue," which also suggests an increased likelihood of success for the Government.[71] Therefore, the Government arguably satisfied the first requirement of the *Nken* test by providing strong arguments that would suggest that the Government would likely succeed on its merits and the lower courts' decisions would subsequently be reversed.

In its per curiam decision, the Court granted the Government the stay on the injunction in part but failed to acknowledge the "likely to succeed" factor in its stay analysis.[72] The Court likely ignored this critical factor because the decision itself was a political one.[73] Josh Blackman, a constitutional law professor at South Texas College of Law, opined that the per curiam decision was a compromise, with the Court purposefully not addressing the first factor which "avoided the need of any member of the liberal block to record a dissent, but still gave the president more or less what he wanted."[74] This opinion is further supported by arguments made by those in support of the stay, which suggest that courts should not question executive orders pertaining to immigration, as the power to make policies and rules for the exclusion of aliens has been delegated by Congress to the Executive.[75] Additionally, it has been argued that the lower courts' preliminary injunctions undermine the president's statutory authority to suspend entry to any and all aliens that may be detrimental to the interests of the United States.[76] This all suggests that, given the current political climate, the Court has tailored its decision not only to reflect the balance of equities, but also to fit personal political opinions.

### *iii. The Court Failed to Correctly Balance the Equities*

Once the Court has established that a stay applicant is likely to succeed on its merits, it may then balance the equities and tailor a decision that reflects the circumstances of the case within its discretion.[77] The balance of equities in individual circumstances is determined by evaluating the relative harms to the parties, as well as considering the public's interest.[78] In *IRAP*,

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71. Reply Brief for Appellant-Petitioner, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017), (No. 16-1436, No. 16-1540, No. 16A1191), 2017 U.S. S. Ct. Briefs LEXIS 2506 at *21.

72. *Id.* at 2087.

73. Josh Blackman, *Symposium: Understanding the Supreme Court's Equitable Ruling in Trump v. IRAP*, SCOTUSBLOG (Jul. 12, 2017, 10:40 AM), http://www.scotusblog.com/2017/07/symposium-understanding-supreme-courts-equitable-ruling-trump-v-irap.

74. *Id.*

75. Brief for American Center for Law and Justice et. al., as Amici Curiae Supporting Petitioners, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017) (No. 16-1436), 2017 U.S. S. Ct. Briefs LEXIS 2125 at *8-9 (citing Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

76. *Id.* at *7 (citing 8 U.S.C. § 1182(f) (2012)).

77. *IRAP*, 137 S. Ct. at 2087.

78. *Nken*, 556 U.S. at 435.

the Court balanced the equities and issued a decision that stayed the injunctions in part, while keeping them in place for others.[79] The Court emphasized that if the injunctions on § 2(c) suspension of entry were stayed, the respondents and any parties with a bona fide relationship to the United States would be immediately harmed because they could not physically enter the United States; thus, the Government's interest in temporarily suspending their entry was outweighed by that harm.[80] The circumstances surrounding *IRAP*, however, suggest that the Court should have tailored their decision to stay the injunction in its entirety. The Court failed to adequately consider the Government's interests in the temporary restraint on entry, as well as the overall public interest of the stay. Thus, Justice Thomas's dissenting opinion, which adequately balanced the equities to hold for staying the injunctions in their entirety, should be the controlling opinion.

Notably, the scales were not tipped in the favor of the Government's overarching interests in asserting its executive power afforded to it by Congress. In *Mandel*, the Court held that the power to exclude aliens is "a power to be exercised exclusively by the political branches of government."[81] The Court established that the executive branch is given congressional authority to deny entry and, as such, when the Executive has a legitimate reason for that exclusion, courts should not look behind the exercise of that discretion.[82] The Executive should rarely be challenged on executive orders pertaining to immigration because it is necessary for defending the country against foreign encroachments and dangers.[83] The Court has further stated: "[p]rotection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized."[84]

The Court's reasoning in *IRAP* suggests that the nation's security and immigration policy, in respect to the temporary suspension of entry, should be compartmentalized against the immediate harms suffered by the respondents. For instance, the Court ignored the Government's interest by failing to address the power and scrutiny afforded to the president in these matters. As emphasized by the Government, the "[p]resident, in consultation with Cabinet officials, determined that a temporary pause was necessary to protect national security while he assessed" the information

79. *IRAP*, 137 S. Ct. at 2088.
80. *Id.*
81. *Mandel*, 408 U.S. at 765.
82. *Id.* at 770.
83. *Id.* at 765.
84. *Haig*, 453 U.S. at 307.

provided by governments regarding their foreign nationals.[85] In opposition, the state of Hawaii, as a respondent, argued that the harms were real and immediate to the respondents, as opposed to the Government's "abstract" harms; for example, students from the designated nations that were admitted to the University of Hawaii, as well as Dr. Elshikh's mother-in-law, were prevented from entering the United States.[86]

The Court weighed these arguments and others to fashion its decision in *IRAP*.[87] As previously stated, though, the Court failed to adequately weigh the interests and irreparable harms to both parties. The respondents' side of the scale, to which the Court tipped its favor, consisted of a few parties that were immediately harmed by the inability to enter the United States for a ninety-day period.[88] The Government's side of the scale, to which the Court gave preference only under certain circumstances, consisted of an executive order that addressed immigration and national security and was drafted by the president and his cabinet—including high-ranking national security officers—under powers afforded to him by Congress.[89] As previously stated, the Executive should rarely be challenged on executive orders pertaining to immigration because it is necessary for the defense of the country against foreign encroachments and dangers.[90] Further, the Government's objective was only to temporarily deny entry to foreign nationals from six countries while programs could be evaluated; the suspension was necessary for a thorough and uninterrupted evaluation to occur.[91] Accordingly, this (im)balance of equities resulted in a decision that should not have been made. Instead, the Court should have aligned with Justice Thomas's dissent and stayed the injunctions in their entirety.

The Court held that it is also important to consider the interests of the public when issuing a stay.[92] The Court clarified that "preserving national security is 'an urgent objective of the highest order'" in the interest of the public.[93] Justice Thomas agreed, emphasizing that a failure to stay the injunctions in their entirety would cause irreparable harm by "'interfering with [the Government's] compelling need to provide for the Nation's security.'"[94] Nevertheless, the Court did not sufficiently balance the

85. Reply Brief for Appellant-Petitioner, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017), (No. 16-1436, No. 16-1540, No. 16A-1191), 2017 U.S. S. Ct. Briefs LEXIS 2506 at *23-24.

86. Supplemental Brief for Appellee-Respondent, *Trump v. Hawaii*, 137 S. Ct. 2080 (2017), (No. 16-1436, No. 16-1540, No. 16A-1191), 2017 U.S. S. Ct. Briefs LEXIS 2505 at *51.

87. *IRAP*, 137 S. Ct. at 2087-88.

88. *Id.* at 2087.

89. *Id.* at 2088.

90. *Mandel*, 408 U.S. at 765.

91. EO-2 § 2(c).

92. *IRAP*, 137 S. Ct. at 2087.

93. *Id.* at 2088 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010)).

94. *IRAP*, 137 S. Ct. at 2090.

equities to account for the public's interest in national security. The Court's opinion, instead, provided a balance that tipped the scales in favor of any person or entity that has a bona fide relationship with the United States, affording immediate relief not only to the respondents, but any person or entity capable of meeting the Court's standard.[95] This equitable relief, provided to unknown persons and entities, is not in the public's best interests. Public interest in national security should be given precedent over specific individuals that would only suffer temporary harm while the government evaluates policies and programs.

In *Nken*, the Court emphasized: "[t]here is always a public interest in prompt execution of removal orders[.]"[96] While *Nken* dealt with the power of the Executive to deport an illegal alien,[97] this reasoning may be extrapolated to the issues addressed in *IRAP*. Like the continued presence of an illegal alien in *Nken,* the entry of a foreign national following an executive order that has temporarily suspended entry undermines United States law.[98] More importantly, the objective is protecting United States citizens from terrorist attacks and the countries identified in EO-2 have been selected because they have produced heightened concerns of terrorism.[99] Arguably, these circumstances heighten the public interest in staying the injunctions.[100] Therefore, the Court erred in balancing the equities by failing to address the importance of the public's interest in the preservation of national security.

Similar to its application of the "likely to succeed standard," the Court's balancing act was likely a political decision, resulting from its initial implicit refusal to address the first factor of the *Nken* test.[101] The Court's emphasis on its discretion to tailor an equitable judgment may suggest a compromise required by the Justices to reach a decision that would provide some semblance of order until the issue could be decided on its merits.[102] The off-balancing of the equities between the Government's interest in national security, which has historically taken precedent in the Court, and the immediate harms to the respondents provide some support to that conclusion. Ultimately, this will likely only result in negative consequences, as the Court should not engage in tailoring decisions to calm choppy political waters. Instead of issuing a holding to maintain the status quo until the question could be decided on its merits, the Court's decision in

95. *Id.* at 2088.
96. *Nken*, 556 U.S. at 436.
97. *Id.* at 418.
98. *Id.* at 436.
99. EO-2 § 1(a)-(b).
100. *Nken*, 556 U.S. at 436.
101. Blackman, *supra* note 73.
102. *Id.*

*IRAP* complicates the balancing of equities by manipulating law and precedent to fashion a remedy pleasing both sides of the aisle. Accordingly, the Court's per curiam opinion in *IRAP* should have aligned with Justice Thomas's dissent, which called for the stay in its entirety.[103]

*iv. Possible Consequences to the Court's Equitable Judgment*

The Court's per curiam decision may have several possible consequences. First, as previously discussed, the Court's decision may have been a political one,[104] which could set a precedent for this Court, as well as lower courts, to allow the political and cultural zeitgeist to influence landmark decisions. For instance, Judge Kozinski noted in his dissent from a denial of stay in *Washington v. Trump*[105] that "[e]ven if a politician's past statements were utterly clear and consistent, using them to yield a specific constitutional violation would suggest an absurd result[.]"[106] Also, as noted by Lee Rudofsky, the Solicitor General of Arkansas, the injunctions that were left in place for individuals in situations similar to the respondents creates an issue of scope.[107] According to Rudofsky, the "scope of an injunction must be no broader than necessary to provide temporary relief to the specific plaintiffs in a case."[108] This decision could set the precedent for courts to award relief to an unknown class, which presents "a significant risk of confusion in the lower courts" because the individual must fit the class for relief, but the class here is undefined.[109] More importantly, the Court's decision in *IRAP* may create repercussions when lower courts review presidential powers and national security interests. As explained above, the Court has given broad discretion to the Executive when addressing immigration and national security.[110] Anything other than that discretion results in increased litigation and judicial review of important, even imperative, executive decisions.

The dispute, which was to be decided on its merits by the Court, was dismissed as moot on October 10, 2017, the Court reasoning § 2(c) had "expired by its own terms."[111] President Trump, however, had already issued a Proclamation on September 24, 2017 following the completion of

103. *IRAP*, 137 S. Ct. at 2089.
104. Blackman, *supra* note 73.
105. 858 F.3d 1168 (9th Cir 2017).
106. *Id.* at 1174 (9th Cir. 2017) (Kozinski, J., dissenting).
107. Lee Rudofsky, *Symposium: The Stays – a Practical Victory, a Legal Concern*, SCOTUSBLOG (Jul. 14, 2017, 6:34 PM), http://www.scotusblog.com/2017/07/symposium-stays-practical-victory-legal-concern/.
108. *Id.*
109. *Id.*
110. *Mandel*, 408 U.S. at 770.
111. Miscellaneous Order, 583 U.S. ____ (2017).

the immigration assessment as instructed by EO-2.[112] The president detailed the national security risk indicators, such as terrorist safe-havens and participation in the Visa Waiver Program, and declared that, after the evaluation of these factors and more, there would henceforth be restrictions on entry of nationals from: "Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen."[113] Various parties subsequently sued for preliminary injunctions of the order.[114] In both instances, the U.S. District Courts for the Districts of Maryland and Hawaii held that the plaintiffs were likely to succeed on claims that the Proclamation violated provisions of the INA and the equities were balanced in their favor.[115] The injunction, similar to that imposed on EO-2 originally, was nationwide.[116]

While the analysis performed by the district courts was proper, these decisions should have never been issued in the first place. Not only should the president be afforded some discretion in immigration policy, but the Court should have stayed the original injunctions, which would have prevented this unnecessary expense to the courts by simply delaying the dispute until it could be decided on its merits. Unsurprisingly, the Government has appealed and the circuit court of appeals will likely address the same issues addressed only months before.[117] Ultimately, this issue will make its way to the Supreme Court again. When that happens, however, it is not unrealistic to predict that any assessment of a preliminary injunction or its stay will not be treated as the extraordinary remedy that previous Justices had intended it to be.

## V. CONCLUSION

In conclusion, the Court's decision to tailor its equitable judgment and grant a stay of the injunctions in part while leaving the injunction in place in respect to the respondents and those similarly situated was an error in judgment on the Court's behalf. In its place, the Court should have issued Justice Thomas's dissent as its per curiam decision and stayed the

112. Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 2017 WL 4231190, *1 (Sept. 24, 2017).

113. *Id.* at *3-4

114. Int'l Refugee Assistance Project v. Trump, No. TDC-17-0361, 2017 WL 4674314, at *2 (D. Md. Oct. 17, 2017); Hawaii v. Trump, No. 17-00050 DKW-KSC, 107 WL 4639560, at *3 (D. Haw., October 17, 2017).

115. *Int'l Refugee Assistance Project*, No. TDC-17-0361, 2017 WL 4674314, at *41; *Hawaii*, No. 17-00050 DKW-KSC, 107 WL 4639560, at *1.

116. *See Hawaii*, 2017 WL 4639560 at *14.

117. Matt Zapotosky, *Justice Department Files Notice of Appeal to Judge's Block of Trump's Travel Ban*, THE WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/world/national-security/justice-department-files-notice-of-appeal-to-judges-block-of-travel-ban/2017/10/20/29586214-b50a-11e7-9e58e6288544af98_story.html?utm_term=.b9df9c98742b.

injunctions in their entirety. The Court erred in sufficiently applying the *Nken* test by ignoring the "likely-to-succeed" factor and, more importantly, inadequately balancing the equities by failing to consider the overarching governmental and public interests in executive discretion and national security. Because of this likely political decision, the Court may have avoided sparking controversy but it does not come without consequence. Ultimately, the short decision in *IRAP* will have lasting effects on courts considering preliminary injunctions and applications to stay.

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